No. 17-1091

IN THE

Supreme Court of the United States

TYSON TIMBS, *et al.*,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONERS

JOHN J. VECCHIONE
Counsel of Record
JULIE A. SMITH
CYNTHIA F. CRAWFORD
CAUSE OF ACTION INSTITUTE
1875 Eye Street, NW, Suite 800
Washington, DC 20006
(202) 499-2415
john.vecchione@causeofaction.org

Counsel for Amicus Curiae

283322

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States through the Fourteenth Amendment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS..... ii

TABLE OF CITED AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT.....2

STATEMENT OF THE CASE 2

ARGUMENT.....3

I. THE PRIVILEGES OR IMMUNITIES CLAUSE INCORPORATES THE EXCESSIVE FINES CLAUSE AGAINST THE STATES.....3

A. The Privileges or Immunities Clause of the Fourteenth Amendment Incorporates the Excessive Fines Clause of the Eighth Amendment against the States.....4

II. PAST JURISPRUDENCE DOES NOT BAR INCORPORATING THE EXCESSIVE FINES CLAUSE THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE.....10

Table of Contents

Page

A. Neither *Slaughter-House* Nor Any of Its Progeny Bar Judgment for Petitioners.....11

B. This Court's Statements about Incorporation of the Excessive Fines Clause Do Not Bar Judgment for Petitioners.....16

C. Historical *In Rem* Practices are No Bar to Enforcing the Excessive Fines Clause Against Modern Forfeitures.....20

III. FORFEITURE IN THIS CASE WOULD VIOLATE THE PRINCIPLE OF *SALVO CONTENEMENTO*.....22

CONCLUSION 28

TABLE OF CITED AUTHORITIES

Page

CASES

Alexander v. United States,
509 U.S. 544 (1993) 8

Austin v. United States,
509 U.S. 602 (1993) 8

Baze v. Rees,
553 U.S. 35 (2008) 19

Bennis v. Michigan,
516 U.S. 442 (1996) 20

Boyd v. United States,
116 U.S. 616 (1886) 9

Browning Ferris Indus. of Vt. v. Keco Disposal, Inc.,
492 U.S.257 (1989) 18, 19, 24-25

Calero-Toledo v. Pearson Yacht Leasing Co.,
416 U.S. 663 (1974) 20

Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) 18, 19

Crandall v. Nevada,
73 U.S. 35 (1868) 27

Cited Authorities

Page

Edwards v. California,
314 U.S. 160 (1941) 27

Gitlow v. New York,
268 U.S. 652 (1925) 16

Hamilton v. City of New Albany,
698 Fed. App'x 821 (7th Cir. 2017) 19

Kennedy v. Louisiana,
554 U.S. 407 (2008) 19

Leonard v. Texas,
137 S. Ct. 847, 197 L. Ed. 2d 474 (2017) 20, 21

Marinello v. United States,
584 U.S. __, 138 S. Ct. 1101 (Mar. 21, 2018) 2

McCutcheon v. Fed. Election Comm'n,
134 S. Ct. 1434 (2014) 1

McDonald v. City of Chicago,
561 U.S. 742 (2010) ..... *passim*

Near v. Minnesota ex rel. Olson,
283 U.S. 697 (1931) 16

One 1995 Toyota Pick-Up Truck v. Dist. of Columbia,
718 A.2d 558 (D.C. 1998) 24

Cited Authorities

Page

Overton v. United States,
582 U.S. __, 137 S. Ct. 1248 (2017) 2

Roper v. Simmons,
543 U.S. 551 (2005) 19

Saenz v. Roe,
526 U.S. 489, 503 (1999) 15

Slaughter-House Cases,
83 U.S. 36, 16 Wall. 36 (1872) ..... *passim*

State v. Timbs,
62 N.E.3d 472 (Ind. Ct. App. 2016) 3, 9

State v. Timbs,
84 N.E.3d 1179 (Ind. 2017) ..... *passim*

United States v. 92 Buena Vista Ave.,
507 U.S. 111 (1993) 20

United States v. Bajakajian,
524 U.S. 321 (1998) ..... *passim*

United States v. Bieri,
21 F.3d 819 (8th Cir. 1994) 10

United States v. Black,
No. 12-cr-00002 (N.D. Cal.) 1

United States v. Cruikshank,
92 U.S. 542 (1875) 15, 16

Page

United States v. Kolsuz,
890 F.3d 133 (4th Cir. 2018) 2

United States v. United Mine Workers of Am.,
330 U.S. 258 (1947) 24

United States v. Ursery,
518 U.S. 267 (1996) 20

STATUTES AND OTHER AUTHORITIES

U.S. CONST., amend. I 16

U.S. CONST., amend. II 8, 16

U.S. CONST., amend. VIII 2, 3, 8, 14

U.S. CONST., amend. XIII 12

U.S. CONST., amend. XIV ..... *passim*

U.S. CONST., amend. XIV, § 1 4

U.S. Const., art. IV 13

U.S. CONST., art. VI 18

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5

Cited Authorities

Page

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769) 23

An Act for Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown, Bill of Rights 1 W. & M., 2d sess. (Dec. 16, 1689).....6

Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277 (2014) 26

Brief of Appellant, *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), No. 27S04-1702-MI-70, 2016 WL 11200867.....9

Erwin Chemerinsky, *The Consitution and Punishment*, 56 Stan. L. Rev. 1049 (2004).....10

Handlin, Oscar, and Handlin, Mary, eds. The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780. Cambridge: Belknap Press of Harvard University Press, 1966 7

I.C. § 34-24-1-1 (Supp. 2012).....3

KS. CONST., Bill of Rights § 9 7

Cited Authorities

Page

Kurt T. Lash, ***The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art***, 98 Geo. L.J. 1241 (2010) 5

Kurt T. Lash, ***The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment***, 99 Geo. L.J. 329 (2011).....11, 13

Matthew Gillespie, ***Shifting Automotive Landscapes: Privacy and the Right to Travel in the Era of Autonomous Motor Vehicles***, 50 Wash. U. J. of L. & Policy 147 (2016).....27

NEV. CONST., art. I, §6 7

Nicholas M. McLean, ***Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause***, 40 Hastings Const. L.Q. 833 (2013) 8, 9-10, 26

PA CONST. OF 1776, § 29 6

PA CONST. OF 1776, § 38 6

PA CONST. OF 1776, § 39 6

Reply Brief of Appellant, *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), No. 27S04-1702-MI-70, 2016 WL 7507913 9

Cited Authorities

Page

Sources of Our Liberties. Edited by Richard L. Perry under the general supervision of John C. Cooper. (Chicago) American Bar Foundation, 1952 6

Steven G. Calabresi & Sarah E. Agudo, ***Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?,"*** 87 Tex. L. Rev. 7, 82 (2008) 8

Storing, Herbert J., ed. The Complete Anti-Federalist. 7 vols. Chicago: University of Chicago Press, 1981 7

Sup. Ct. R. 37.2(a) 1

The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America. 7 vols. (Francis Newton Thorpe ed., 1909) 6

The Founders' Constitution, Volume 1, Chapter 1, Document 3, The University of Chicago Press 6

The Founders' Constitution, Volume 1, Chapter 1, Document 6, The University of Chicago Press 7

Cited Authorities

Page

The Founders' Constitution, Volume 1, Chapter 14, Document 26, The University of Chicago Press 7

The Founders' Constitution, Volume 5, Bill of Rights, Document 4, The University of Chicago Press 6

The Founders' Constitution, Volume 5, Bill of Rights, Document 10, The University of Chicago Press 7

The Papers of George Mason, 1725--1792. Edited by Robert A. Rutland. 3 vols. Chapel Hill: University of North Carolina Press, 1970.....6

Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF AMERICAN UNION (1868).....27

W. VA. CONST. art. II, ¶ 2.....7

William Baude, Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. (forthcoming 2018) (July 29, 2018) 17

Pursuant to Supreme Court Rule 37.2, Cause of Action Institute ("CoA Institute") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae CoA Institute is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to advance government accountability, transparency, and the rule of law, to protect liberty and economic opportunity, and to educate the public about these matters.[2] As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CoA Institute has particular interest in challenging government overreach in the criminal justice system, protecting the rule of law, and working to combat the criminalization of conduct that can be addressed through existing civil law, sometimes called "overcriminalization." To fulfill this mission, CoA Institute has, among other things, represented criminal defendants in federal court, e.g., *United States v. Black*, No. 12-cr-00002 (N.D. Cal.),

---

1. In accordance with Supreme Court Rule 37.2(a), CoA. All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and neither the parties, their counsel, nor anyone except CoA Institute financially contributed to preparing this brief.

2. CoA Institute, *About*, *www.causeofaction.org/about* (last visited Sept. 10, 2018).

and appeared as *amicus curiae* in criminal matters before this Court and others. *See, e.g., Marinello v. United States*, 584 U.S. __, 138 S.Ct. 1101 (Mar. 21, 2018) (certiorari and merits stages); *Overton v. United States*, 582 U.S. __, 137 S. Ct. 1248 (2017); *United States v. Kolsuz*, 890 F.3d 133, 135 (4th Cir. 2018).

SUMMARY OF THE ARGUMENT

Section 1 of the Fourteenth Amendment expressly prohibits States from abridging privileges or immunities of United States citizens. This Court should hold that the Privileges or Immunities Clause incorporates the Excessive Fines Clause against States. This Court has never ruled on whether section 1 incorporates the Excessive Fines Clause of the Eighth Amendment against the States. This Court has said in *dicta* that the Clause is incorporated. And contrary to the court below, *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), this Court has never said or implied otherwise. Differences between modern forfeitures and early American *in rem* practices are legally and constitutionally significant and the latter are no reason not to apply the Excessive Fines Clause against the States. The ancient principle of *salvo contenemento suo* is included in the protection of the Excessive Fines Clause. As a citizen of the United States, therefore, Timbs is privileged and immune from excessive fines, including forfeiture of his vehicle in this case.

STATEMENT OF THE CASE

Tyson Timbs was named as a defendant in two cases brought by the State of Indiana, first a criminal case in June 2013 and then a civil action in August 2013. *See*

State v. Timbs, 62 N.E.3d 472, 474 (Ind. Ct. App. 2016). The criminal case settled: The State dismissed charges of dealing and conspiracy to commit theft and, in exchange, Timbs pleaded guilty to one felony count of dealing a controlled substance and one felony count of theft. *Id.*

This matter arises from the second case, an action against both Timbs and his vehicle, which the State sought to forfeit. Under its forfeiture statute, I.C. § 34-24-1-1 (Supp. 2012), Indiana "must show that a person used the vehicle to transport an illicit substance ... for the purpose of dealing or possessing the substance." *State v. Timbs*, 84 N.E.3d 1179, 1184 (Ind. 2017). After a trial, the court issued written findings that the "amount of the forfeiture sought is excessive, and is grossly disproportional to the gravity of" of the criminality to which Timbs pleaded guilty. *See Timbs*, 84 N.E.3d at 1181 (quoting trial court).

The Indiana Court of Appeals affirmed. *See Timbs*, 62 N.E.3d at 475 ("forfeitures are subject to the Excessive Fines Clause of the Eighth Amendment"). The Indiana Supreme Court reversed "because the United States Supreme Court has not held that the Clause applies to the States through the Fourteenth Amendment." *Timbs*, 84 N.E.3d at 1181. This Court granted the writ.

ARGUMENT

I. THE PRIVILEGES OR IMMUNITIES CLAUSE INCORPORATES THE EXCESSIVE FINES CLAUSE AGAINST THE STATES.

The Excessive Fines Clause of the Eighth Amendment is incorporated against the States through the Privileges

or Immunities Clause of the Fourteenth Amendment. The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A. The Privileges or Immunities Clause of the Fourteenth Amendment Incorporates the Excessive Fines Clause of the Eighth Amendment against the States.

Section 1 of Fourteenth Amendment expressly provides: "No State shall" abridge "the privileges or immunities of citizens of the United States." "On its face, this appears to grant ... United States citizens a certain collection of rights – i.e., privileges or immunities – attributable to that status" as U.S. citizens. *See McDonald v. City of Chicago*, 561 U.S. 742, 808 (2010) (Thomas, J., concurring in part and concurring in judgment).

The terms "privileges" and "immunities" were both understood as synonyms for "rights," whether they were used alone or paired, and have been used interchangeably with "rights" since the time of Blackstone. *See Id.* at 822 (Thomas, J., concurring) (first clear insight into "meaning of the Privileges or Immunities Clause in § 1" is that the terms "'privileges' and 'immunities' were synonyms for 'rights.'"); *see also* Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 Geo. L.J. 1241, 1256-57 (2010) (cited in *McDonald*, 561 U.S. at 815) (Thomas, J., concurring)); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *125-129.

The ratifying public likely understood that the Fourteenth Amendment would make the "collection of rights ... attributable to" holding United States citizenship enforceable against the States and not just the federal government. *See McDonald*, 561 U.S. at 808 (Thomas, J., concurring). Public debates about ratification of the Fourteenth Amendment "indicate that § 1 was understood to enforce constitutionally declared rights against the States, and they provide no suggestion that any language in the section other than the Privileges or Immunities Clause would accomplish that task." *McDonald*, 561 U.S. at 833 (Thomas, J., concurring); *see also id.* at 837 (Thomas, J., concurring) ("evidence plainly shows that the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights").

The Revolutionary and Reconstruction public understandings of constitutional rights encompassed by the Privileges or Immunities Clause both included, of course, the right to be free from excessive fines. Indeed,

the imposition of excessive fines was among the many breaches by which King James the Second was accused of "endeavor[ing] to subvert . . . the laws and liberties of this kingdom."[3] Thus, the Act of Parliament by which William and Mary acceded to the throne included a provision against the imposition of excessive fines. A hundred years later, a similar provision was commonly addressed in state constitutions and declarations of rights. *See, e.g.*, PA CONST. OF 1776, §§ 29, 38, 39, Thorpe 5:3089, 3090;[4] Delaware Declaration of Rights, 11 Sept. 1776 Sources 338—40;[5] Virginia Declaration of Rights, 12 June 1776, Mason Papers 1:287—89;[6] MASS. CONST., 2 Mar. 1780,

---

3. *An Act for Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown*, Bill of Rights 1 W. & M., 2d sess., c. 2 (Dec. 16, 1689), available at http://press-pubs.uchicago.edu/founders/documents/v1ch14s6.html.

4. The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America. 7 vols. (Francis Newton Thorpe ed., 1909) Washington, D.C.: Government Printing Office, 1909.

5. The Founders' Constitution, Volume 5, Bill of Rights, Document 4, The University of Chicago Press, http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss4.html (citing Sources of Our Liberties. Edited by Richard L. Perry under the general supervision of John C. Cooper. [Chicago:] American Bar Foundation, 1952).

6. The Founders' Constitution, Volume 1, Chapter 1, Document 3, The University of Chicago Press, http://press-pubs.uchicago.edu/founders/documents/v1ch1s3.html (citing The Papers of George Mason, 1725--1792. Edited by Robert A. Rutland. 3 vols. Chapel Hill: University of North Carolina Press, 1970).

Handlin 441—72;[7] North Carolina Ratifying Convention, Declaration of Rights and Other Amendments, 1 Aug. 1788, Elliot 4:242--46, 248—49.[8] And, the writings of Brutus included a bar against excessive fines as necessary to the security of liberty. Brutus, no. 2, 1 Nov. 1787, Storing 2.9.23--33[9]. This concern for protecting against the imposition of excessive fines had not abated at the time of the Civil War. Kansas, the last state admitted to the Union before war broke out, included an excessive fines prohibition in its Bill of Rights, as did the two states, West Virginia and Nevada, that were admitted to the Union while the war was raging. Ks. Const., Bill of Rights § 9 (1961) (maintained by KS Sec. of State); W. Va. Const. art. II, ¶ 2 (maintained by WV Dep't of Arts, Culture & History); Nev. Const., art. I, §6 (maintained by NV Legislature). Freedom from excessive fines was thus

---

7. The Founders' Constitution, Volume 1, Chapter 1, Document 6, The University of Chicago Press, http://press-pubs.uchicago.edu/founders/documents/v1ch1s6.html, (citing Handlin, Oscar, and Handlin, Mary, eds. The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780. Cambridge: Belknap Press of Harvard University Press, 1966).

8. The Founders' Constitution, Volume 5, Bill of Rights, Document 10, The University of Chicago Press, http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss10.html (citing Elliot, Jonathan, ed. The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787. . . . 5 vols. 2d ed. 1888. Reprint. New York: Burt Franklin, n.d.).

9. The Founders' Constitution, Volume 1, Chapter 14, Document 26, The University of Chicago Press, http://press-pubs.uchicago.edu/founders/documents/v1ch14s26.html (citing Storing, Herbert J., ed. The Complete Anti-Federalist. 7 vols. Chicago: University of Chicago Press, 1981).

consistently among the privileges and immunities that Englishmen and Americans sought to protect in the two centuries leading up to Reconstruction.

All the post-1855 state constitutions banned excessive fines. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 877 n. 176 (2013). "By the end of 1868, explicit prohibitions on 'excessive fines' existed in thirty-five of thirty-seven state constitutions." *Id.* at 876-77 (citing Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*," 87 Tex. L. Rev. 7, 82 (2008)). The fundamental rights incorporated against the States by the Fourteenth Amendment therefore includes the Eighth Amendment's prohibition against Excessive Fines.[10]

As for the Eighth Amendment, this Court has held that the Excessive Fines Clause encompasses both civil and criminal forfeitures that are extracted as punishment even in part for some offense. *See Austin v. United States*, 509 U.S. 602 (1993) (civil); *Alexander v. United States*, 509 U.S. 544 (1993) (criminal); *see also United States v. Bajakajian*, 524 U.S. 321, 331 n.6 (1998) ("Because some recent federal forfeiture laws have blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture, we have held that a modern statutory forfeiture

10. *Cf. McDonald*, 561 U.S. at 776 (plurality opinion) (finding incorporation of Second Amendment based in part on 22 of 37 States' constitutions protecting the right to keep and bear arms in 1868).

is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled *in rem* or *in personam.")* (citation omitted). Given the record below, there can be no dispute that the entirety of this case was a means to punish Timbs for crimes over and above those for which the State had settled when he pleaded guilty. *See Timbs*, 84 N.E.3d at 1180-84; *Timbs*, 62 N.E.3d at 473-77; Brief of Appellant at *5-*18, *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), No. 27S04-1702-MI-70, 2016 WL 11200867, at *5-*18; Reply Brief of Appellant at *4-*11, *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), No. 27S04-1702-MI-70, 2016 WL 7507913, at *4-*11; *cf. Boyd v. United States*, 116 U.S. 616, 633-34 (1886) ("proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal"). Under this Court's Eighth Amendment precedents involving federal actors and the express terms of the Fourteenth Amendment, Petitioner Timbs has an enumerated right as a United States citizen to be free from excessive fines which Indiana cannot abridge through this action.

One touchstone of the Excessive Fines Clause is gross disproportionality between a fine or forfeiture and the gravity of the offense. *See Bajakajian*, 524 U.S. at 337, 339-340 (1998); *see also id.* at 348-49 (Kennedy, J., dissenting). Conceptualizing a violation's severity in terms measurable against property value is certainly not precise but just as certainly not impossible. *See Bajakajian*, 524 U.S. at 336 (rejecting strict proportionality as constitutional standard because "any judicial determination regarding the gravity of a particularly criminal offense will be inherently imprecise"); Nicholas M. McLean, *Livelihood*,

Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833, 845-46 (2013). Assessing gross disproportionality is a task well within judicial competence, indeed so central to the judiciary's traditional work that Petitioners' right to be free of excessive fines fits entirely within the fundamental right of access to the courts. *See, e.g., United States v. Bieri*, 21 F.3d 819, 824 (8th Cir. 1994) (proportionality is "a fact-specific evaluation"); Erwin Chemerinsky, *The Consitution and Punishment*, 56 Stan. L. Rev. 1049, 1063 (2004) ("a prohibition of 'excessive fines' inherently requires some way of deciding what is too much"). The "right of free access to its ... courts of justice" is a right held by "citizens of this great country, protected by implied guarantees of its Constitution" that is recognized by the majority in *Slaughter-House*, 83 U.S. at 79, as encompassed within the Privileges or Immunities Clause. *See McDonald*, 561 U.S. at 820 n.6 (Thomas, J., concurring). The ability "to enforce rights in the courts" is one of the "great fundamental rights" that come with United States citizenship. Cong. Globe, 39th Cong., 1st Sess. 475 (Sen. Trumbull). The Privileges or Immunities Clause expressly prohibits Indiana from abridging such rights by enforcing its seizure law against Petitioners without regard to the Eighth Amendment's prohibition on excessive fines and forfeitures.

II. PAST JURISPRUDENCE DOES NOT BAR INCORPORATING THE EXCESSIVE FINES CLAUSE THROUGH THE PRIVILEGES OR IMMUNITIES CLAUSE.

This Court's decisions in *Slaughter-House Cases*, 83 U.S. 36, 16 Wall. 36 (1872), and its immediate progeny pose

no bar to ruling for Petitioners in this case on the basis that the Privileges or Immunities Clause incorporates the Excessive Fines Clause against the States. *See* Brief for Petitioners at 39. This Court's statements outside the *Slaughter-House* context do not suggest otherwise.

A. Neither *Slaughter-House* Nor Any of Its Progeny Bar Judgment for Petitioners.

"Justice Miller's opinion in the *Slaughter-House Cases* left the door open to incorporating federal privileges and immunities, such as those listed in the Bill of Rights, even as it closed the door on the nationalization of the common law." Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 Geo. L.J. 329, 334 (2011) (Lash, *Part II*). In *Slaughter-House*, this Court confronted a Louisiana statute restricting the operation, ownership, corporate structure, pricing discretion, and location of cattle and slaughtering businesses around New Orleans. The petitioners argued that the law violated section 1 of the Fourteenth Amendment, including the Privileges or Immunities Clause, among other constitutional provisions, because it granted an exclusive charter to a private corporation and excluded others from engaging in otherwise lawful occupations. *Slaughter-House*, 83 U.S. at 64 ("it is said that in creating a corporation of this purpose, and conferring upon it exclusive privileges–privileges which it is said constitute a monopoly–the legislature has exceeded its power"). "This Court [was] thus called upon for the first time to give construction to" the Privileges or Immunities Clause. *Slaughter-House*, 83 U.S. at 67.

At the time of *Slaughter-House*, legislative imposition of broad restrictions on regional businesses and occupations after weighing the costs of disruption against health-and-safety and economic goals was a relatively novel exercise of State police power. The statute was also deeply controversial, having been enacted by Louisiana's racially mixed legislature which had been elected through a system imposed by the federal military throughout the Reconstruction South.[11] Little wonder then that the *Slaughter-House* petitioners argued that the Louisiana law violated their privileges and immunities that had been long recognized as rights of every citizen under any government.

A divided Court ruled against the petitioners on narrow grounds, holding that the Louisiana statute did not violate "the rights claimed by" the petitioners because those rights were "not privileges and immunities of citizens of the United States," but rather were within the rights protected by the States. *See* 83 U.S. at 80.[12] But this Court did not rule or suggest more generally that the Privileges or Immunities Clause did not encompass any definable, discoverable, or otherwise judicially articulable and enforceable rights. Quite the opposite.

The Court held that there are two categories of

---

11. *See Slaughter-House*, 83 U.S. at 70-71 (noting that States were not granted full participation in federal government until they ratified the Thirteenth Amendment).

12. *Slaughter-House* expressly did not rule on whether the Louisiana law violated that State's constitution because "that question ... would not be open to review in this court." 83 U.S. at 66. So, *Slaughter-House* did not rule that the petitioners had no rights affected by the Louisiana law.

privileges and immunities: those that adhere to citizens of the United States, which are "under the protection of the Federal Constitution" and thus can be enforced against the States; and those that adhere to citizens of a State, and which "rest for their security and protection where they have heretofore rested," *i.e.*, with the States. *See Slaughter-House*, 83 U.S. at 74-75; *see also* Lash *Part II*, 99 Geo. L.J. at 337 ("Miller's insistence that Article IV and Section One protect two distinct categories of rights mirrors the view embraced by the man who actually drafted the Privileges or Immunities Clause.").

The Court provided a detailed exegesis, articulation, definitions, and examples of rights encompassed by the terms "privileges" and "immunities" as used in the Fourteenth Amendment and Article IV of the Constitution. *See Slaughter-House*, 83 U.S. at 76-80. The Court made a point of doing so:

> But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws.

Id. at 79. Among those rights identified by the Court as within the privileges and immunities subject to the protection of the Federal government were: "to come to the seat of government to assert any claim he may have upon the government;" "to seek its protection;" "to share its offices;" "to engage in administering its functions;" to access its seaports; to access the courts; to "demand care and protection of the Federal government over his

life, liberty, and property when on the high seas or within the jurisdiction of a foreign government;" "to peaceably assemble and petition for redress of grievances;" to access the "privilege of the Writ of *habeas corpus*." *Id.* at 79. The list was not intended to be exclusive but illustrative – and clearly relates to rights that are express or implied by the United States Constitution. *Id.* at 79 ("we venture to suggest ***some*** which owe their existence to the Federal government") (emphasis added).

By ruling against the petitioners, *Slaughter-House* thus held only that the Louisiana statute did not violate the Privileges or Immunities Clause or the other federal constitutional provisions the petitioners relied on – ***not*** that the privileges and immunities of citizens of the United States could only be drawn exclusively from the Constitution.

The federal constitutionality of state legislation weighing disruption against health-and-safety and economic goals is rarely raised today. The case at bar involves a different type of statute altogether. This case is about whether a specific forfeiture would be excessive under the Eighth Amendment and therefore unconstitutionally abridge a privilege or immunity of Mr. Timbs under the express terms of Fourteenth Amendment.[13]

---

13. *Cf. McDonald v. Chicago*, 561 U.S. 742, 854 (2010) (Thomas, J., concurring) (noting that it was the dissenters in *Slaughter-House* who "would have held that the Privileges or Immunities Clause protected the unenumerated right that the butchers in that case asserted"); *id.* ("Because *[McDonald* did] not involve an unenumerated right, it is not necessary to resolve the question whether the [Privileges or Immunities] Clause protects such rights, or whether the Court's decision in *Slaughter-*

The canonical interpretation and modern progeny of *Slaughter-House* likewise do not bar entering judgment for Petitioners.[14] Neither *United States v. Cruikshank*, 92 U.S. 542 (1875), nor *Saenz v. Roe*, 526 U.S. 489, 503 (1999), address the Eighth Amendment or its Excessive Fines Clause. Here, as in *McDonald*, the "question presented in this case is not whether our entire Fourteenth Amendment jurisprudence must be preserved or revised, but only whether, and to what extent, a particular clause in the Constitution protects the particular right at issue here." *McDonald*, 561 U.S. at 813 (Thomas, J., concurring). Therefore, ruling for Petitioners here, whose rights are expressly enumerated in the Excessive Fines Clause of the Eighth Amendment, is not barred by *Slaughter-House* or any of its progeny.

House was correct."). Indeed, the dissenters in *Slaughter-House* would likely have agreed with *amicus* that Petitioners' Eighth Amendment rights were enforceable against Indiana here. *See* Slaughter-House, 83 U.S. at 87 (Field, J., dissenting) (petitioners' position had "some support in the fundamental law of the country").

14. In *McDonald*, the plurality opinion (not to mention Justice Thomas's concurring opinion) noted that "many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation." *McDonald*, 561 U.S. at 756 (plurality opinion); *id.* at 754 (summarizing canonical interpretation as "the Privileges or Immunities Clause protects only those rights 'which owe their existence to the Federal government, its National character, its Constitution, or its laws'" but "other fundamental rights – rights that predated the creation of the Federal Government and that 'the State governments were created to establish and secure' – were not protected by the Clause").

Even if it were otherwise, authoritative interpretation and application of *Slaughter-House* and *Cruikshank* have "changed with time." *See McDonald*, 561 U.S. at 810 (plurality opinion). The initial authoritative interpretation of *Cruikshank*, namely, that rights under the First and Second Amendments were not exclusively tied to the Constitution sufficiently to have been incorporated through the Fourteenth Amendment, no longer holds sway. *See McDonald*, 561 U.S. at 748 (plurality opinion) (private right to bear arms incorporated through the Fourteenth Amendment's Due Process Clause); 561 U.S. at 743-44 (plurality opinion) (since the late 19th century, this Court has not hesitated to hold that some rights within "a Bill of Rights guarantee" are incorporated against the States through the Due Process Clause of the Fourteenth Amendment even though others may not have been) (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (free speech) and *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (free press)).

This Court's jurisprudence of the Privileges or Immunities Clause of the Fourteenth Amendment, whether under *Slaughter-House* itself, any of its initial progeny, or its more modern applications, is no barrier to entering judgment for Petitioners.

B. This Court's Statements about Incorporation of the Excessive Fines Clause Do Not Bar Judgment for Petitioners.

Below, the Indiana Supreme Court inaccurately described and fundamentally misinterpreted this Court's statements about the Excessive Fines Clause. *See State v. Timbs*, 84 N.E.3d 1179, 1183 (Ind. 2017). More to the

point, that court's manner of deciding this case, at least as documented in its reported opinion, does not – nor could it ever – meaningfully address the question presented.

Whether a provision of the federal Constitution is enforceable against the States is not an issue that can be authoritatively or persuasively resolved merely by tabulating *dicta*. Rather, "Supreme Court decisions supposedly state the true law as it has always been, rather than changing the law." William Baude, Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 Harv. L. Rev. (forthcoming 2018) (July 29, 2018). Ratification of the Fourteenth Amendment either did or did not incorporate the Excessive Fines Clause against the States. Incorporation occurred or not upon ratification, not by means of a later judicial decision. Resolving the question presented by this case therefore requires analysis of first principles, not talismanic verbiage. Yet the Indiana Supreme Court made exactly that mistake. It refused to apply this Court's standards for answering the question presented,[15] and mischaracterized two simple statements by this Court about the Excessive Fines Clause while doing so. *See Timbs*, 84 N.E.3d at 1183 ("Just as *Cooper's* statement that the Excessive Fines Clause is enforceable against the States is dictum, so too is *McDonald's* statement that the Clause is not."). But the Indiana Supreme Court is as bound by the Constitution as this Court and should have ordered the

15. *Compare McDonald*, 561 U.S. at 750 (plurality opinion) (rights incorporated against States are identifiable through "well developed" standards) *with Timbs*, 84 N.E.3d at 1183-84 ("Indiana is a sovereign state within our federal system, and we elect not to impose federal obligations on the State that the federal government itself has not mandated").

constitutionally mandated result. *See* U.S. CONST. art. VI ("This Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

This Court's opinion in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001), states that both the Excessive Fines and Cruel and Unusual Punishments Clauses are incorporated. But contrary to suggestions by the Indiana Supreme Court, that statement is *dictum* because it was not necessary to decide the question presented in *Cooper* – namely, the proper standard for appellate review of constitutional challenges to punitive damage awards – not because it relies on a citation to *Furman v. Georgia* which only "involved an application of the prohibition against cruel and unusual punishments." *See Timbs*, 84 N.E.3d at 1182; *see also Cooper Indus.*, 532 U.S. at 426.

For its part, *McDonald* only says that this Court has not yet decided whether the Excessive Fines Clause is incorporated. *McDonald*, 561 U.S. at 765 n. 13 (plurality opinion) ("we have never decided whether ... the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause"). *McDonald's* statement is fully consistent with the actual ruling in *Cooper* and substantially identical to this Court's earlier statement about the Excessive Fines Clause in *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) ("we need not answer several questions" including "whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment"). None

of the opinions in *Browning-Ferris*, *Cooper Indus.*, or *McDonald* ever state, suggest, or imply that the Eighth Amendment's Excessive Fines Clause is not incorporated against the States.[16] Contrary statements by the Indiana Supreme Court are unsupportable.

Other precedent, though not controlling, more thoroughly grapples with modern questions about forfeiture and excessiveness, particularly as they are posed in this case under the federal Constitution. *See, e.g.*, *Hamilton v. City of New Albany*, 698 Fed. App'x 821 (7th Cir. 2017) (unpublished) (listed by the court in *Timbs*, 84 N.E.3d at 1183) (vacating summary judgment for city on plaintiff's excessive-fines claim without analysis of

16. Even if tabulating *dicta* about the Excessive Fines Clause were sufficient to answer the question presented, the Indiana Supreme Court's opinion is incomplete inasmuch as it does not mention let alone analyze other opinions in which this Court suggests that the Excessive Fines Clause is incorporated against the States. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (in case about constitutionality of death penalty for child rape, this Court stated, "The Eighth Amendment, applicable to the States through the Fourteenth Amendment, provides that 'excessive bail shall not be required, nor excessive fines imposed....'"); *Baze v. Rees*, 553 U.S. 35, 47 (2008) (plurality opinion) (in case about lethal injection, this Court stated, "The Eighth Amendment to the Constitution, applicable to the States through the Due Process Clause of the Fourteenth Amendment, provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'") (citation omitted); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (in case about constitutionality of death penalty imposed on persons between 15 and 18 years old, this Court stated, "The Eighth Amendment provides: 'Excessive bail shall not be required, nor excessive fines imposed.... The provision is applicable to the State through the Fourteenth Amendment.") (internal citations omitted).

incorporation). But the Indiana Supreme Court did not analyze whether or how they might apply in this case, and only recited some of those cases and holdings. The Indiana Supreme Court's opinion below provides no basis for ruling against Petitioners here.

C. Historical *In Rem* Practices are No Bar to Enforcing the Excessive Fines Clause Against Modern Forfeitures.

Founding-era *in rem* forfeitures have been taken as nearly *ipso facto* assurance that modern forfeiture practices are constitutional. *See, e.g., United States v. Ursery*, 518 U.S. 267, 290 (1996); *Bennis v. Michigan*, 516 U.S. 442, 446-448 (1996); *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 119 (1993) (plurality opinion); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682, 684-85 (1974); see also *Leonard v. Texas*, 137 S. Ct. 847, 848, 197 L. Ed. 2d 474, 476 (2017) (Thomas, J., statement respecting the denial of certiorari) ("The Court has justified its unique constitutional treatment of civil forfeiture largely by reference to a discrete historical practice that existed at the time of the founding."). However, "[s]uch forfeitures sought to vindicate the Government's underlying property right in customs duties, and like other traditional *in rem* forfeitures, they were not considered at the Founding to be punishment for an offense." *United States v. Bajakajian*, 524 U.S. 321, 340 (1998).

But those early *in rem* forfeitures (actions "against a thing") made sense because the essential element of such a claim, much like the doctrine of *res ipsa loquitur*, was that the defendant property as found and seized

carried indisputable evidence of a customs violation, i.e., absence of a duty stamp. The legal fiction underlying *in rem* cases was jurisdictionally sufficient precisely because the essential evidence underlying the claim was both indisputable and borne by the defendant property itself as found and seized without more.

The characteristics of modern forfeiture, on the other hand, are significantly and legally different. See *Leonard*, 137 S. Ct. at 848-49 (Thomas, J., statement). Much modern forfeiture practice targets wholly domestic property that, as found and seized, does not bear similarly indisputable indicia of any violation by its owner, its user, or anyone else. The property itself need not and routinely does not bear any indicia of forfeitability. Evidence essential to winning a modern forfeiture claim routinely arises entirely from other information about the encounter and the property holder, not as in early American practice from the property as found and seized without more.

So here in this case. The essential element of this action, namely, that Petitioner's vehicle was used to transport or possess a controlled substance, was not drawn from any indisputable evidence about the vehicle as found and seized. Far from the definitive absence of a duty stamp, the State's use of the only evidence drawn from the vehicle (its odometer) was in fact vigorously disputed below.[17] And none of the other evidence supporting this

---

17. The State speculated that the odometer reading was a result of trips to buy and bring home heroin. *See* Brief of Appellee at *5, *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), No. 27S04-1702-MI-70, 2016 WL 9243717, at *5. But the "mileage accumulated on the vehicle does not substantiate the claim of multiple trips" to transport heroin for sale, in large part because Timbs "stated his

forfeiture action arose from the property as found and seized.[18]

Revolutionary era forfeiture is no more the same animal as Indiana's action here than a gecko is a crocodile. In every important way, modern forfeitures such as Indiana seeks here are deprivations which, were it not for overly simplified comparisons to early American *in rem* practices, would otherwise require prior due process under both the Fifth and Fourteenth Amendments. See *Bennis*, 516 U.S. at 454 (Thomas, J., concurring).

III. FORFEITURE IN THIS CASE WOULD VIOLATE THE PRINCIPLE OF *SALVO CONTENEMENTO*.

If there were any doubt that enforcing the State's seizure of Timbs's vehicle would violate the Privileges or Immunities Clause, the venerable provenance and fundamental nature of the rights protected by that Clause independently confirm their enforceability against Indiana. Among those ancient protections is the right to be free from destructive fines and penalties. Timbs's federally enforceable privileges and immunities against

---

sister lived in Ohio and he visited her. Those trips would explain the mileage on the vehicle." *Id.* at *8.

18. *See id.* at *3 ("complaint seeking forfeiture did not allege repeated use of the vehicle to transport heroin as the basis for the requested forfeiture but only referred to one offense on or around May 31, 2013 ... as the basis for the requested forfeiture"); *see also id.* at *4 ("The complaint for forfeiture only relied on one act as the basis of the forfeiture. The state did not amend its complaint nor request that it be amended to conform to the evidence."); *id.* at *8 ("Other than the controlled buys there was no evidence he made any other sales of drugs.").

Indiana's power to impose fines and forfeitures include the fundamental right to maintain his independent, basic economic viability.

Allowing Indiana to enforce its seizure of the vehicle through this action would violate the ancient principle of *salvo contenemento suo*. Blackstone described the concept thus:

> The reasonableness of fines in criminal cases has also been usually regulated by the determination of magna carta, concerning amercements for misbehaviour in matters of civil right. *"Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti;* ***salvo contenemento suo****: et mercator eodem modo, salva mercandisa sua; et villanus eodem modo amercietur, salvo wainagio suo."* A rule, that obtained even in Henry the second's time, and means only, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contenement, or land; to the trader his merchandize; and to the countryman his wainage, or team and instruments of husbandry.

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *372-73 (1769) (emphasis added).

When this Court first applied the Excessive Fines Clause in *United States v. Bajakajian*, 524 U.S. 321, 327 (1998), it noted that the English sources for the prohibition

against excessive fines encompass punishments that exceed a defendant's ability to pay. 524 U.S. at 335-36 (describing and quoting Magna Charta's prohibition against fines that would "deprive a wrongdoer of his livelihood"). Although *Bajakajian* focusses on gross disproportionality between a fine and the culpability of the defendant as the constitutional limiting factor in that case, it expressly noted that defendant had not argued, and the district court had made no finding regarding, the relationship between the fine and the defendant's ability to pay. 524 U.S. at 340 n.15. *Bajakajian* therefore left unresolved the question of whether, in cases where it matters, punishment should also be weighed against an individual's ability to pay. *See Bajakajian*, 524 U.S. at 354-55 (Kennedy, J., dissenting) ("The Court's holding may in the long run undermine the purpose of the Excessive Fines Clause. One of the main purposes of the ban on excessive fines was to prevent the King from assessing unpayable fines to keep his enemies in debtor's prison."); *id.* ("concern" about inability to pay "is not implicated here—for of necessity the money is there to satisfy the forfeiture"); *see also, e.g., One 1995 Toyota Pick-Up Truck v. Dist. of Columbia*, 718 A.2d 558, 565 n. 15 (D.C. 1998) (*Bajakajian* "left open the prospect that other factors may be included in the proportionality analysis, such as the wealth of the owner of the property and the effect of the forfeiture on his or her livelihood"); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947) (reducing $3.5 million criminal contempt fine to $700,000 in light of defendant's financial resources to avoid excessiveness).

The prohibition in the Excessive Fines Clause "was taken verbatim from the English Bill of Rights of 1689." *Bajakajian*, 524 U.S. at 335 (citing *Browning Ferris*

Indus. of Vt. v. Keco Disposal, Inc., 492 U.S.257, 266-67 (1989)). That Bill took aim at certain abuses of the Stuart kings and their judges, including fines that were "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land." *Id.* at 335 (citations and quotations omitted).

> Magna Charta—which the Stuart judges were accused of subverting—required only that amercements (the medieval predecessors of fines) should be proportional to the offense and that *they should not deprive a wrongdoer of his livelihood*: A free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, *saving to him his contenement*; and a Merchant likewise, *saving to him his merchandise*; and any other villain than ours shall be likewise amerced, *saving his wainage*.

Bajakajian, 524 U.S. at 335-36 (emphases added) (citations and quotations omitted).

"As English subjects, the colonists considered themselves to be vested with the same fundamental rights as other Englishmen. They consistently claimed the rights of English citizenship in their founding documents, repeatedly referring to these rights as 'privileges' and 'immunities.' ... As tensions between England and the Colonies increased, the colonists adopted protest resolutions reasserting their claim to the inalienable rights of Englishmen. Again, they used the terms 'privileges' and 'immunities' to describe these rights." *McDonald v. Chicago*, 561 U.S. 742, 817 (2010) (Thomas, J. concurring);

see also id. at 768 (plurality opinion) (noting Blackstone's assertion that right to keep and bear arms was "one of the fundamental rights of Englishmen") (citations and quotations omitted). As set forth above, these fundamental rights included Magna Carta's and the 1689 English Bill of Right's prohibition on excessive fines, "including both its proportionality principle and the limiting principle of *salvo contenemento.*" *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 865-66 (2013); *see also* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 321 (2014) (Magna Carta includes "specific orders that defendants not be ruined by fines - that their ability to maintain a livelihood be saved - which is a separate and distinct consideration from the proportionality between the harm caused and the penalty imposed"). Early colonial charters, the commentaries of English influencers on American legal thought, and the written work of founding luminaries are replete with references to the inherent limitation on fines and forfeitures that *salvo contenemento* had provided for centuries. *See* McLean, *Livelihood*, *supra.* at 866-870.

When the Eighth Amendment was ratified, therefore, its Excessive Fines Clause, as a matter of common understanding, encompassed the protection of *salvo contenemento.* Its basic principle – "that a fair and just monetary penalty requires not just some form of proportionality between penalty and offense, but also the protection of a minimum core level of economic viability for persons against whom penalties are assessed, determined with some reference to the individual's personal economic circumstances – were unquestionably recognized as fundamental rights at common law by the seventeenth

and eighteenth centuries." *Id.* at 901.[19] This understanding continued through Reconstruction and ratification of the Fourteenth Amendment. "[T]he historical evidence suggests the phrase 'excessive fines' continued to be understood – even in the post-Civil War era – as a unique term of art tied to the meaning of older English provisions barring 'excessive fines.'" *Id.* at 883 (citing and explaining, among other contemporary sources, Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF AMERICAN UNION (1868) (citing Magna Carta's principle of *salvo contenemento* as part of "the merciful spirit" of excessive fines clauses of constitutions of the States)). The common understanding at the time of its ratification was that the Fourteenth Amendment, by incorporating the Eighth Amendment's ban on excessive fines, limited the States' power to impose fines and forfeitures through the doctrine of *salvo contenemento*.

---

19. Loss of a car can deprive an indigent person of the ability to earn a livelihood. *See* Matthew Gillespie, *Shifting Automotive Landscapes: Privacy and the Right to Travel in the Era of Autonomous Motor Vehicles*, 50 Wash. U. J. of L. & Policy 147, 166 (2016) ("Personal transportation ... is often necessary for employment, healthcare, and other basic needs of an individual. For many, there are no feasible alternatives to personal transportation."). In this case, forfeiture would also be a direct restriction on Timbs's fundamental right to travel. *See Crandall v. Nevada*, 73 U.S. 35, 39 (1868) (holding unconstitutional state tax levied on persons residing in State who wish to travel out of it "by the common and usual modes of public conveyance"); *see also Edwards v. California*, 314 U.S. 160, 172 (1941) (holding unconstitutional state law prohibiting transportation into state of indigent persons, including "persons who are presently destitute of property and without resources to obtain the necessities of life").

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Indiana Supreme Court.

Respectfully submitted,

JOHN J. VECCHIONE
Counsel of Record
JULIE A. SMITH
CYNTHIA F. CRAWFORD
CAUSE OF ACTION INSTITUTE
1875 Eye Street, NW, Suite 800
Washington, DC 20006
(202) 499-2415
john.vecchione@causeofaction.org

Counsel for Amicus Curiae

September 11, 2018